In the Supreme Court

Appeal from the Court of Appeals and
the Circuit Court for the County of Genesee
appealed from Judge Richard Yuille

MARIAN T. ZSIGO-Plaintiff/Appellant,

Docket No. 126984

V

HURLEY MEDICAL CENTER-Defendant/Appellee.

BRIEF ON APPEAL-APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF QUESTIONS PRESENTED

DID THE COURT OF APPEALS ERRONEOUSLY REVERSE THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND DIRECTED VERDICT MOTIONS BY RULING THAT THERE WAS AN ABSENCE OF A FACT QUESTION AS TO WHETHER THE EMPLOYMENT POSITION OF LORENZO POWELL AIDED POWELL IN ACCOMPLISHING THE SEXUAL ASSAULT OF THE BOUND AND RESTRAINED PLAINTIFF WITHIN THE MEANING OF THE RESTATEMENT OF AGENCY 2D §219(2)(D)?

TRIAL COURT ANSWERED:	YES.
COURT OF APPEALS ANSWERED:	NO.
PLAINTIFF ANSWERED:	YES.
DEFENDANT ANSWERED:	NO.

WAS THE MICHIGAN COURT OF APPEALS CORRECT IN HOLDING THAT THE RESTATEMENT OF AGENCY 2d §219(2)(d) APPLIES TO ACTIONS IN TORT?

TRIAL COURT ANSWERED:	YES.
COURT OF APPEALS ANSWERED:	YES.
PLAINTIFF ANSWERED:	YES.
DEFENDANT ANSWERED:	NO.

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STATEMENT OF BASIS OF JURISDICTION

Plaintiff/Appellant appeals the Order of the Michigan Court of Appeals dated August 16, 2004 denying Plaintiff's Motion for Reconsideration, pursuant to MCR 7.301(A)(2) and the Michigan Supreme Court's Order Granting Plaintiff's Application for Leave to Appeal dated May 12, 2005.

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STATEMENT OF ORDER APPEALED FROM

Plaintiff/Appellant (hereinafter "Plaintiff") seeks reversal of the August 16, 2004 Order of the Michigan Court of Appeals denying Plaintiff's Motion for Reconsideration. In a 2-1 decision, with Judge Helene White voting for reconsideration, the Court of Appeals denied Plaintiff's Motion for Reconsideration with respect to the May 4, 2004 Opinion of the Michigan Court of Appeals. That May 4, 2004 Opinion reversed the Trial Court's denial of Defendant's Motion for a Directed Verdict in the Trial Court. The May 4, 2004 Opinion thus overturned a $1,250,000.00 Verdict that a jury awarded in favor of Plaintiff in this battery and intentional infliction of emotional distress case in which Plaintiff, while in the throes of a mental breakdown, was sexually molested while she was in Defendant's emergency room bound and restrained by her wrists and ankles.

In its May 4, 2004 Opinion, the Court of Appeals held that the Restatement of Agency §219(2)(d) applies to actions in tort – such as this case. In other words, the Court of Appeals held that, even though Nurse's Aide Lorenzo Powell acted outside the scope of his employment as an Emergency Room Nurse's Aide, Defendant could still be held liable for Powell's sexual assault of Plaintiff if there was a fact question as to whether Powell's employment (agency) relationship with Defendant "aided in accomplishing" the torts of battery and intentional infliction of emotional distress committed by Powell against Plaintiff. But, in the same May 4, 2004 Opinion, the Court of Appeals held that Plaintiff had not raised a fact question as to whether Defendant Powell's job provided an instrumentality or

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special access associated with his agency status to commit the torts against Plaintiff.

The Court of Appeals held that the Trial Court should have granted Summary Disposition or a Directed Verdict. The Court of Appeals thus overturned the $1,250,000.00 Verdict won by Plaintiff.

In fact, as Plaintiff pointed out in her May 12, 2004 Motion for Reconsideration in the Court of Appeals, the testimony of Defendant's Emergency Room Head Nurse, Donna Bueche, easily raised a fact question as to whether, in molesting the bound and restrained Plaintiff, Powell's job gave him the "ways and means" to enter a very private doorway into Plaintiff's room and subject the bound and restrained Plaintiff to fellatio and to the sticking of his finger in Plaintiff's vagina. Bueche's testimony, as well as the fact that Powell molested a similarly situated second bound and restrained woman in Defendant's Emergency Room a mere month after Plaintiff was molested, clearly raised a fact question as to Defendant's liability under Restatement of Agency 2d §219(2)(d).

Judge Helene White voted to grant the Motion for Reconsideration. (See Appendix, pg. 3a). But, despite the Bueche testimony and the fact that Powell molested yet a second bound and restrained woman within a month after Plaintiff's molestation, the Court of Appeals denied Plaintiff's Motion for Reconsideration.

It was clearly erroneous for the Court of Appeals to take the $1,250,000.00 Verdict away from Plaintiff. If left standing, the Court of Appeals May 4, 2004 Opinion obviously will cause a material injustice to Plaintiff.

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It is respectfully submitted that the Michigan Supreme Court should correct the error committed by the Court of Appeals. This Court should reverse the Court of Appeals on the Restatement of Agency 2d §219(2)(d) issue, and should remand this case to the Court of Appeals for consideration of the remaining appellate issues raised by Defendant.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS BELOW

A. Material Proceedings Below.

Plaintiff seeks reversal of the August 16, 2004 Michigan Court of Appeals Order. In that Order, in a 2-1 decision (with Judge White voting to grant Plaintiff's Motion for Reconsideration), the Court of Appeals denied reconsideration with respect to the May 4, 2004 Court of Appeals Opinion. (Appendix, pg. 3).

In the May 4, 2004 Opinion, the Court of Appeals reversed the rulings of the Genesee County Circuit Court Trial Court that had denied Defendant's Motions for Directed Verdict and Summary Disposition. The May 4, 2004 Court of Appeals Opinion thus overturned the February 4, 2002 $1,250,000.00 Verdict that the jury had awarded Plaintiff in this tort (battery and intentional infliction of emotional distress claims) case. (See Appendix, pgs. 15a-18a).

This lawsuit was commenced on October 22, 1999. The Trial Court issued a Scheduling Order pursuant to MCR 2.401(B)(2) setting deadlines. This case went to Case Evaluation on February 21, 2001, and both parties rejected the non-unanimous award of $150,000.00.

On the first day of the first scheduled trial date, Defendant cited to the Trial Court the case of Bozarth v Harper Creek Board of Education, 94 Mich App 351;

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288 NW2d 424 (1979). Although a jury had been selected, the Trial Court disbanded the jury so that the Trial Court could consider whether Bozarth justified dismissing the case. A few weeks later, the Trial Court issued an opinion denying Defendant's Summary Disposition Motion. Defendant then sought Leave to Appeal.

On October 4, 2001, the Court of Appeals denied Defendant's Application for Leave to Appeal. A new trial was then begun on January 23, 2002. At the close of Plaintiff's proofs, Defendant moved for a Directed Verdict. One (1) of the arguments Defendant asserted was that Defendant could not be held liable under *respondeat superior* based on the tort of an employee acting outside the scope of his employment.

Invoking the Restatement of Agency 2d §219(2)(d), the Trial Court denied Defendant's Directed Verdict Motion, applying the same reasoning as it had applied in denying Summary Disposition. The Trial Court held that there was a fact question as to whether Lorenzo Powell was aided in accomplishing the molestation of Plaintiff by the agency relationship Powell had with Defendant. The Trial Court thus denied Defendant's Motion for Directed Verdict.

On February 4, 2002, the Jury rendered a Verdict for Plaintiff in the amount of $1,250,000.00. (See Verdict Form, Appendix, pgs. 15a-18a). On February 25, 2002, the Trial Court entered Judgment consistent with the Jury's Verdict. (See Judgment, Appendix, pgs. 19a-21a). Defendant did not file a Motion for Judgment Notwithstanding the Verdict, a New Trial or Remittitur. Instead, Defendant appealed the Verdict to the Michigan Court of Appeals.

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On May 4, 2004, the Michigan Court of Appeals issued the Opinion that is contained in the Appendix at pages 4a-14a. That Opinion considered but one (1) of the several issues – the first issue – asserted by Defendant on appeal. This was the issue of whether the Trial Court should have granted Defendant's Motions for Summary Disposition and for a Directed Verdict based on Bozarth.

The Court of Appeals first pointed to the case of Champion v Nationwide Security, 450 Mich 702; 595 NW2d 596 (1996). With Champion as support, the Zsigo Court of Appeals ruled that the Restatement of Agency 2d §219(2)(d) "applies to actions in tort". (See May 4, 2004 Opinion, Appendix, pg. 11a).[1] The Court of Appeals held, however, that Plaintiff Mary Zsigo did not raise a fact question as to whether Lorenzo Powell's Emergency Room Nurse's Aide position supplied him with the specific access to, authority over or instrumentality for the commission of the sexual assault of Plaintiff. (See May 4, 2004 Opinion, Appendix, pg. 14a).

The Court of Appeals thus held that the Trial Court should have granted Summary Disposition and/or a Directed Verdict against Plaintiff. In other words, the Court of Appeals held that there was an absence of a fact question in support of the proposition that §219(2)(d) was satisfied by Plaintiff. The Court of Appeals thus reversed the Judgment in favor of Plaintiff and remanded for entry of a Judgment of Dismissal.

[1] Plaintiff acknowledges that, in a subsequent Opinion issued on August 19, 2004, a different Panel of the Court of Appeals considered the Restatement of Agency 2d §219(2)(d) issue in Salinas v Genesys Health System, 263 Mich App 315; 688 NW2d 112 (2004). The Salinas Court of Appeals Opinion took the position that Champion did not necessarily constitute an adoption of the Restatement of Agency 2d §219(2)(d). In any event, the Zsigo panel concluded that, "Restatement of Agency 2d, §219(2)(d) applies to actions in tort". (See Zsigo Court of Appeals Opinion, Appendix, pgs. 4a-14a).

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On May 12, 2004, Plaintiff filed an MCR 7.215(I) Motion for Reconsideration. In that Motion, Plaintiff pointed out that the testimony of the Emergency Room Head Nurse, Donna Bueche, raised a genuine issue of fact as to whether Powell's position as an Emergency Room Nurse's Aide afforded Powell the specific access or instrumentality to sexually molest Plaintiff. In addition, Plaintiff pointed out the fact that Powell had molested a second bound and restrained woman in the same area of the Emergency Room within a month after he molested Plaintiff. Plaintiff pointed out that this warranted reversal of the May 4, 2004 Opinion.

On August 16, 2004, in a 2-1 decision, the Court of Appeals denied Plaintiff's Motion for Reconsideration. Judge Helene White would have granted the Motion for Reconsideration. (See Appendix, pg. 3a). Thus, it was only by a 2-1 majority – with Judge White disagreeing – that the Michigan Court of Appeals denied Plaintiff's Motion for Reconsideration.

As will be more fully pointed out in Section II(B) of this Brief, there was definitely enough evidence in the Record to raise a fact question that Lorenzo Powell's position as an Emergency Room Nurse's Aide on the night shift gave Powell vast responsibilities and access. A person in Powell's position answered call lights, brought materials to patients, transported patients to the floor, participated in the discharge of patients, cleaned patients' rooms, and participated in a wide variety of other important duties. His job gave Powell the knowledge and access to enter Plaintiff's room from a bathroom door and sexually molest Plaintiff as she lay bound and restrained in a special emergency room. Indeed,

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the special access gave Powell the access and instrumentality to molest yet another bound and restrained Emergency Room patient a mere month after Powell molested Plaintiff.

The evidence demonstrated that Emergency Room Nurse's Aide Lorenzo Powell was inclined to sexually molest mentally ill patients as they lay restrained by their wrists and ankles in a small room within the Emergency Room of Defendant. The evidence introduced raised a fact question as to whether Powell's position afforded Powell special access to commit these sexual batteries on bound and restrained mentally ill patients.

The Court of Appeals erroneously overturned the Jury's Verdict. Plaintiff thus respectfully seeks reversal of the Order of the Court of Appeals denying Plaintiff's Motion for Reconsideration and an Order remanding this matter to the Michigan Court of Appeals so that the Court of Appeals can consider the other issues raised by Defendant's Appeal.

B. Plaintiff's Version of the Facts of the Case.

1. Background.

Plaintiff was born on September 14, 1960 and grew up in Shiawassee County, Michigan. (TT, Appendix, pg. 35a).[2] Plaintiff obtained a Bachelor of Arts degree in Social Work from the University of Michigan – Flint. (TT, Appendix, 35a-37a).

For the past several years, Plaintiff has been employed with Genesee County Community Mental Health Services as a Mental Health Therapist working with the developmentally disabled.

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[2] Portions of the Trial Transcript (TT) cited are included for reference in the Appendix.

2. Plaintiff's Mental Health History.

Plaintiff has been hospitalized six (6) times in her life due to mental illness. (TT, Appendix, pgs. 38a-39a). As of the trial, Plaintiff was taking significant medication for her condition. (TT, Appendix, pg. 40a).

In approximately 1995, Plaintiff was treating with a physician who prescribed her lithium. (TT, Appendix, pg. 41a). Plaintiff stopped taking the lithium on the advice of another doctor because the lithium was making her sick. (TT, Appendix, pg. 41a). Subsequently, in 1998, Plaintiff had a manic episode and was hospitalized at Defendant, Hurley Medical Center.

3. July 9, 1998 Incident.

A few days prior to July 9, 1998, Plaintiff suffered from insomnia. (TT, Appendix, pg. 42a). On the morning of July 9, 1998, after not sleeping for several days, Plaintiff called her supervisor at Genesee County Community Mental Health in a panic and told him she was quitting. (TT, Appendix, pg. 42a). Plaintiff then climbed into her vehicle and went to a Meijer store. (TT, Appendix, pg. 43a). At the Meijer store, Plaintiff felt very confused. (TT, Appendix, pg. 43a).

After leaving the store, Plaintiff drove to her doctor's office. (TT, Appendix, pg. 44a). In Plaintiff's medical records, her doctor stated, "She thinks she has been poisoned". (See Trial Exhibit 20, Appendix, pg. 62a; TT, Appendix, pg. 44a).

After leaving the doctor's office in an acute psychosis, Plaintiff began driving. Plaintiff felt there was a bomb in her car. (TT, Appendix, pgs. 44a-45a). Because Plaintiff felt there was a bomb in her car, Plaintiff went to her mechanic.

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(TT, Appendix, pg. 45a). In reality, there was no bomb in Plaintiff's car. Plaintiff was simply delusional. (TT, Appendix, pg. 45a).

While at her mechanic's place of business, Plaintiff began speaking very rapidly and kicking the tires of her vehicle. She was laughing hysterically and stated that there was a bomb in her car. (TT, Appendix, pg. 45a). The mechanic called the police. (TT, Appendix, pg. 45a). Plaintiff struggled with the police as she was handcuffed. She was placed in the back of the police cruiser. (TT, Appendix, pgs. 45a-46a).

Plaintiff was taken by the police to Defendant's Crisis Center Clinic. (TT, Appendix, pg. 46a). At the clinic, Plaintiff was extremely belligerent. (TT, Appendix, pg. 46a). Plaintiff was then put into a shackle and taken to the Emergency Room at Defendant. (TT, Appendix, pg. 46a).

Plaintiff was placed in a small room within the Emergency Room. The room had two (2) doors. One door led to the hallway; one door led to an adjoining bathroom. (TT, Appendix, pgs. 47a, 51a). While in the small room, Plaintiff again became belligerent. She kicked walls and cussed loudly. (TT, Appendix, pg. 47a). The delusional Plaintiff stated that the Mafia was after her. (TT, Appendix, pg. 48a). Plaintiff's wrists and ankles were restrained in a 4-point leather restraint fastened on a hospital bed. (TT, Appendix, pgs. 49a-50a).

After Plaintiff had been placed in the 4-point leather restraint, a nurse pulled down Plaintiff's underwear and attempted to insert a catheter in Plaintiff. Plaintiff pulled her left hand out of the restraint and attempted to hit the nurse. (TT, Appendix, pgs. 51a-52a). Security was then called, and Plaintiff's left hand

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was placed back into the restraint. The restraint was then tightened. (TT, Appendix, pg. 52a). The catheter was never inserted in Plaintiff, but Plaintiff's underwear remained pulled down. (TT, Appendix, pg. 52a).

Plaintiff became more belligerent and, as she lay in the restraints, she told the nurse to "lick my vagina". (TT, Appendix, pgs. 52a-53a). After the nurses and security left the room, one (1) male employee in a blue uniform remained in Plaintiff's room. He picked up papers left from the bandages and catheter. (TT, Appendix, pg. 53a). Plaintiff later learned that the male employee in the blue uniform was Lorenzo Powell. (TT, Appendix, pg. 61a).

Powell was a Nursing Assistant with Defendant. (See Bueche Deposition, Appendix, pg. 66a). Powell was supervised by Donna Bueche – Head Nurse of Defendant's Emergency Room. (Bueche Deposition, Appendix, pg. 65a). Bueche testified that Powell's job duties as a Nursing Assistant included helping Registered Nurses **bring patients to rooms**, helping patients climb on stretchers, **answering lights if patients needed something** and **assisting with the cleaning of patient rooms**. (Bueche Deposition, Appendix, pgs. 65a-66a). As an Emergency Room Nursing Assistant, Powell had the right to enter patients' rooms. (Bueche Deposition, Appendix, pgs. 68a-69a).

On July 9, 1998, Powell was able to enter and remain in the room where Plaintiff lay bound on a hospital bed in 4-point restraints. Powell was able to do so because of his status as an Emergency Room Nurse's Aide. (Bueche Deposition, Appendix, pgs. 70a-71a).

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After the nurses left, Powell remained in Plaintiff's room to clean the room. As Powell was alone in the room with Plaintiff (who was in 4-point restraints and in the midst of a manic episode), Powell went to Plaintiff's bedside. As Plaintiff testified, Powell "put one of his fingers inside my vagina". (TT, Appendix, pg. 54a).

Due to her deranged mental state, Plaintiff thought Powell was an extremely powerful person. (TT, Appendix, pg. 54a). Plaintiff begged Powell to release her. (TT, Appendix, pg. 54a). Powell then raised one (1) of his fingers indicating he would soon return. (TT, Appendix, pg. 55a). Powell then left the room through the door to the hallway. He then returned approximately five (5) minutes later through the adjoining room. (TT, Appendix, pg. 55a).

Plaintiff fervently hoped Powell would release her. (TT, Appendix, pg. 55a). Plaintiff again asked Powell to release her. Powell then pointed to his penis and to Plaintiff's mouth. (TT, Appendix, pg. 55a). Powell then pulled out his erect penis and stuck it in Plaintiff's mouth. Powell pumped his penis in Plaintiff's mouth and ejaculated in Plaintiff's mouth. (TT, Appendix, pgs. 55a-56a). After swallowing Powell's semen, Plaintiff again asked Powell to release her. Powell smiled and, again, stuck his finger in the air as if to say "in a minute". Powell then left the room. (TT, Appendix, pg. 56a).

Later in the day on July 9, 1998, Plaintiff was taken to the Psychiatric Unit of Defendant. (TT, Appendix, pgs. 56a-57a). A few days later, Plaintiff reported the sexual assaults described above. (TT, Appendix, pgs. 57a-58a).

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Powell pleaded the Fifth Amendment at the trial when he was asked whether he had stuck his finger in Plaintiff's vagina and had oral sex with Plaintiff on July 9, 1998. (See Powell Deposition, Appendix, pgs. 79a-80a).

4. Initial Investigation.

On July 12, 1998, Verdell Duncan was contacted by Defendant's Coordinator of Public Safety, Dawn Woodroff, regarding Plaintiff's sexual assault complaint. (TT, Appendix, pgs. 24a-25a). Duncan was Defendant's Administrator for Cultural Diversity and Equal Opportunity. (TT, Appendix, pg. 23a).

On July 28, 1998, Duncan talked to Plaintiff. (TT, Appendix, pgs. 26a, 59a). Plaintiff told Duncan she did not know the name of the perpetrator. (TT, Appendix, pgs. 59a-60a). Plaintiff told Duncan that the perpetrator was an African American man wearing a blue uniform with scars on his face. (TT, Appendix, pgs. 27a, 60a-61a). Plaintiff told Duncan she thought the perpetrator might be a janitor because he was picking up papers and pushing a bucket. (TT, Appendix, pgs. 27a, 60a). Duncan then spoke to the African American janitorial workers scheduled to work on July 9, 1998. After concluding that none was the individual Plaintiff had described, Duncan concluded his investigation.

5. Subsequent Sexual Molestation by Lorenzo Powell in the Emergency Room on Another Emotionally Disturbed Female Patient in Restraints.

Approximately one (1) month later, on August 11, 1998, one Laura Schuman was brought to Defendant in an emotionally deranged state. (See Schuman Deposition, Appendix, pgs. 82a-84a). After arriving at the Emergency Room, Schuman was bound and restrained and taken to a room within the Emergency Room. (Schuman Deposition, Appendix, pg. 84a). While Schuman

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was restrained, a Nursing Assistant fondled her vaginal area. (Schuman Deposition, Appendix, pgs. 85a-86a).

After Schuman was discharged from the hospital, the Nursing Assistant telephoned Schuman at her home and asked Schuman for a "blow job". (Schuman Deposition, Appendix, pg. 87a). Schuman's caller identification revealed the caller as LORENZO POWELL. (Schuman Deposition, Appendix, pg. 88a).

Schuman telephoned Defendant to report Powell's sexual misconduct. (Exhibit 9, p. 65). Bueche then went to Schuman's home, and verified that Powell's name was on Schuman's caller I.D. (Schuman Deposition, Appendix, pgs. 88a-89a).

6. Plaintiff's Identification of Powell.

After Schuman's caller identification of Powell, Verdell Duncan once again became involved. Duncan testified that, when he met with Powell and observed Powell's physical appearance, Plaintiff's report came to mind because of the scars on Powell's face. (TT, Appendix, 29a). Because Plaintiff had told Duncan her assailant was an African American, and had a scarred face, Duncan believed Powell might have been the perpetrator as to both Plaintiff and Schuman. (TT, Appendix, 28a).

Duncan gathered a stack of pictures of African American employees – one picture was of Powell – to show Plaintiff. (TT, Appendix, pgs. 29a-30a). On September 4, 1998, Plaintiff was presented with the stack of pictures. (TT,

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Appendix, pg. 30a). Plaintiff immediately identified Lorenzo Powell as the person who had molested her on July 9, 1998. (TT, Appendix, pg. 31a).

7. The Trial Verdict and the Appellate Proceedings.

Duncan then prepared a report regarding his investigation of the two (2) incidents and forwarded the report to the Labor Relations Department of Defendant. The report was identified as Plaintiff's Trial Exhibit 7, and was used by Duncan to refresh his recollection at trial.

At the time of trial, Plaintiff's claims against Defendant were battery and intentional infliction of emotional distress. The Jury rendered a Verdict in favor of Plaintiff on these two (2) claims on February 4, 2002. The Jury awarded Plaintiff $750,000.00 in past non-economic damages, and $50,000.00 per year in future non-economic damages beginning in the year 2003 and extending through the year 2012. The Jury thus awarded Plaintiff $750,000.00 in past damages and $500,000.00 in future damages. (See Verdict Form, Appendix, pgs. 15a-18a) After reducing the Verdict to present value, the Court entered Judgment in favor of Plaintiff in the amount of $1,147,247.42. (See Judgment, Appendix, 19a-21a). Defendant then appealed.

As has been pointed out above, on May 4, 2004, the Michigan Court of Appeals held that the Trial Court should have granted Defendant's Motion for Summary Disposition or for Directed Verdict. After Plaintiff's Motion for Reconsideration was denied in a 2-1 ruling, Plaintiff filed an Application for Leave to Appeal. By order of this Court, on May 12, 2005 Plaintiff's Application for Leave to Appeal was granted.

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For the reasons stated below, the Michigan Supreme Court should reverse the May 4, 2004 Opinion of the Court of Appeals.

ARGUMENT

I. THE MICHIGAN COURT OF APPEALS ERRONEOUSLY REVERSED THE TRIAL COURT'S DENIAL OF DEFENDANT'S SUMMARY DISPOSITION AND DIRECTED VERDICT MOTIONS. THE COURT OF APPEALS THUS ERRONEOUSLY REVERSED THE $1,250,000.00 JURY VERDICT WON BY PLAINTIFF. DESPITE THE VOTE OF COURT OF APPEALS JUDGE HELENE WHITE TO GRANT REHEARING, THE COURT OF APPEALS HELD THAT THERE WAS AN ABSENCE OF A FACT QUESTION AS TO WHETHER THE POSITION OF LORENZO POWELL AIDED POWELL IN ACCOMPLISHING THE SEXUAL ASSAULT OF THE BOUND AND RESTRAINED PLAINTIFF WITHIN THE SCOPE OF THE RESTATEMENT OF AGENCY 2d §219(2)(d). IN FACT, THE TESTIMONY OF DEFENDANT'S EMERGENCY ROOM HEAD NURSE DONNA BUECHE WAS CLEARLY ENOUGH TO RAISE A FACT QUESTION AS TO WHETHER POWELL'S EMERGENCY ROOM NURSE'S AIDE POSITION "AIDED IN ACCOMPLISHING" POWELL'S SEXUAL ABUSE OF THE BOUND AND RESTRAINED PLAINTIFF WHERE PLAINTIFF WAS IN THE THROES OF AN EMOTIONAL BREAKDOWN. THEREFORE, UNDER THE RESTATEMENT OF AGENCY §219(2)(d), THERE WAS A FACT QUESTION AS TO DEFENDANT'S LIABILITY. THE MICHIGAN COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S DENIAL OF DEFENDANT'S SUMMARY DISPOSITION AND DIRECTED VERDICT MOTIONS.

A. Standard of Review.

The Court of Appeals held that the Trial Court should have granted Defendant's Motion for a Directed Verdict. In reviewing the Trial Court's Directed Verdict ruling, the Court of Appeals was obligated to apply an abuse of discretion standard. Phinney v Perlmutter, 222 Mich App 513; 564 NW2d 532 (1997); Hatfield v St. Mary's Medical Center, 211 Mich App 321; 535 NW2d 272 (1995); Clemens v Lesnet, 200 Mich App 456, 461; 505 NW2d 283 (1993). Plaintiff

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submits that the Court of Appeals misapplied the abuse of discretion standard in reversing the Trial Court.

B. The Testimony of Defendant's Emergency Room Head Nurse Donna Bueche was Clearly Enough to Raise a Fact Question as to Whether the Emergency Room Nurse's Aide Position of Lorenzo Powell "Aided in Accomplishing" Powell's Sexual Abuse of the Bound and Restrained Plaintiff where Plaintiff was in the Throes of an Emotional Breakdown. Therefore, Under the Restatement Of Agency §219(2)(d), there was a Fact Question as to Defendant's Liability. The Michigan Court of Appeals Erred in Reversing the Trial Court's Denial of Defendant's Summary Disposition and Directed Verdict Motions.

In the Trial Court, Defendant contended that, because Powell's acts were *ultra vires*, the acts could not bind Defendant under the doctrine of *respondeat superior* liability. But the Trial Court rejected Defendant's argument. The Trial Court applied Restatement of Agency 2d §219(2)(d) to this case. Restatement Agency, 2d, §219 states, in pertinent part, as follows:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> * * *
>
> (d) the servant purported to act or speak on behalf of the principal and there was reliance upon apparent authority, or he was **aided in accomplishing the tort by the existence of the agency relationship**. (Emphasis added.).

Pointing to the phrase "aided in accomplishing the tort by the existence of the agency relationship", the Trial Court held that there was a fact question in this particular case – with its unique facts – as to whether Powell was "aided in accomplishing" the sexual battery of Plaintiff by "the existence of the agency relationship".

In the Zsigo Court of Appeals Opinion, the Court of Appeals confronted the issue of whether Restatement of Agency 2d §219(2)(d) applied to this case. After

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examining the law and considering the Michigan Supreme Court's favorable reference to §219(2)(d) in Champion v Nationwide Security, 450 Mich 702; 595 NW2d 596 (1996), the Zsigo Court of Appeals held that, "We conclude that the Restatement of Agency, 2d §219(2)(d) applies to actions in tort." (See Michigan Court of Appeals Zsigo Opinion, Appendix, pg. 11a).

Obviously, Plaintiff agrees with the foregoing portion of the Court of Appeals Opinion. What Plaintiff disagrees with is the Court of Appeals conclusion that, in the Zsigo case, there was not a fact question as to whether Powell's position as a Nurse's Aide in the Emergency Room of Defendant provided Powell with specific access to, authority over, or the instrumentality for the commission of the sexual assault which Powell inflicted on the bound, restrained and mentally ill Plaintiff. (See Court of Appeals Opinion, Appendix, pg. 14a).

The Court of Appeals Opinion failed to consider the testimony – which was delivered by way of a trial deposition – of Donna Bueche. Bueche was the Head Nurse of Defendant's Emergency Room. Bueche was Powell's supervisor at the time of Plaintiff's molestation by Powell. According to Bueche, Powell was one (1) of two (2) Nurse's Aides in the Emergency Room (ER) on the night Plaintiff was molested. (Bueche deposition, Appendix, pgs. 66a, 77a).[3] According to Bueche, Powell's position as one (1) of two (2) Nurse's Aides on the ER nightshift gave Powell vast responsibilities and access. Powell's position gave him the power to answer call lights, bring materials to patients, transport patients to the floor, participate in the discharge of patients, clean patients' rooms and perform a wide

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[3] The Bueche deposition was played to the Jury at TT, Appendix, pgs. 32a-33a.

array of other duties. Bueche testified that the position of Emergency Room Nurse's Aide was very important. (Bueche Deposition, Appendix, pgs. 73a-74a).

No area of the ER was off limits to Powell. His omnibus duties and access gave him the right and responsibility to carry out a wide range of tasks. This included virtually unlimited access to the rooms of Emergency Room patients. (Bueche Deposition, Appendix, pgs. 74a-75a). Indeed, Powell had access to every area and room of the ER. Powell also had the right to restrain patients. (Bueche Deposition, Appendix, pgs. 72a-76a).

At page 8 of the Court of Appeals May 4, 2004 Opinion, (Appendix, pg. 11a) the Court of Appeals misstated the facts about the room in which Plaintiff was molested. The Court of Appeals stated that, "Anyone employed by Defendant in the Emergency Room had access to the treatment suite. The evidence reveals that the room in which Plaintiff was treated was accessible by visitors, other employees, and even non-employees from a common hallway door."

The foregoing statement by the Court of Appeals was factually incorrect. In fact, the room in which Plaintiff was molested was at the end of a hall in the ER. Bueche testified that a non-employee would **not** be able to enter Plaintiff's room. (Bueche Deposition, Appendix, pgs. 70a-71a). But Powell could enter Plaintiff's room due to the vast access to ER patients' rooms afforded by Powell's job. If a patient simply hollered, as a Nurse's Aide, Powell could enter that patient's room. Because Plaintiff was yelling and cursing, Powell had the right to enter Plaintiff's room. (Bueche Deposition, Appendix, pgs. 70a-71a, 73a).

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Thus, Bueche's testimony refutes the Court of Appeals' statement that non-employees or other employees had the same access to Plaintiff's room as Powell had. Bueche testified that Powell, "by virtue of his job" had the right to enter Plaintiff's room. He also had the right to participate in the restraint of Plaintiff by virtue of his job. (Bueche Deposition, Appendix, pgs. 72a-73a). The clear inference of Bueche's deposition is that **very few** employees had access to Plaintiff's room. Furthermore, contrary to the Court of Appeals' Opinion, only two (2) visitors – and they had to be family members – could be in Plaintiff's room.

Thus, the Record refutes the Court of Appeals' claim that visitors had broad access to Plaintiff's room. Plaintiff's room was accessible to very few visitors and very few employees.

Powell's position also afforded Powell access to the small bathroom entrance to Plaintiff's room. The significance of the bathroom access is vividly demonstrated by reviewing the operative facts of Plaintiff's molestation.

After a nurse stuck a catheter in Plaintiff's urethra, Plaintiff hit at the nurse. Security and Powell then restrained Plaintiff. After the violent and dramatic incident of restraining Plaintiff occurred, Powell remained behind, supposedly to pick up wrappings from the floor. (TT, Appendix, pg. 53a).

How did Powell have the authority to enter Plaintiff's room in the first place and help restrain Plaintiff? How did Powell have the authority to stay behind in Plaintiff's room while Plaintiff was bound and restrained? It was the omnibus responsibility – the total access – of Powell's job that allowed all of this. Powell's job did not simply afford Powell "the opportunity". The Nurse's Aide Emergency

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Room position afforded Powell with the "ways and means" to enter Plaintiff's room in the first place, and then to remain behind to molest Plaintiff.

After Powell stuck his finger in Plaintiff's vagina, Plaintiff asked the uniformed Powell to free her. Powell lifted his finger, indicating that he would be back shortly. Powell then walked out of Plaintiff's room, and returned through the bathroom.

The Court of Appeals' May 4, 2004 Opinion does not mention Powell returning to Plaintiff's room through the adjoining bathroom. In light of Bueche's testimony, it is reasonable to infer that Powell's job, with its unlimited access, afforded Powell the "ways and means" to go through the hallway, and then reenter Plaintiff's room through the adjoining bathroom door. This refutes the idea that **any** employee would have had the knowledge and access to reenter through the adjoining bathroom door.

After Powell reentered Plaintiff's room, Plaintiff asked if Powell would release her. Powell then pointed to his penis to lead Plaintiff to believe that he would release her if she sucked his penis. Powell then inserted his penis into Plaintiff's mouth. Powell humped into Plaintiff's mouth until he ejaculated into her mouth. Plaintiff swallowed Powell's semen. The bound and restrained Plaintiff then again asked Powell to release her. Powell raised his finger as if to say "in a minute". Powell then left the room.

Clearly, there is a fact question as to whether Powell used the "ways and means" of his job to trick Plaintiff into giving Powell fellatio. This is because: (1) the omnibus and unlimited access nature of Powell's job allowed him to enter

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Plaintiff's room and assist in restraining Plaintiff; (2) the omnibus and unlimited access of Powell's job allowed him to remain in Plaintiff's room after Plaintiff was restrained; (3) the omnibus and unlimited access gave Powell the knowledge and access to utilize the special route to reenter the room through the bathroom; and (4) the preceding facts gave Powell the apparent authority to trick Plaintiff into giving him fellatio in return for the expectation that Powell would free Plaintiff. Thus, even under an extremely narrow reading of Restatement Agency 2d, §219(2)(d), Plaintiff used the "ways and means" of his job to have oral sex with Plaintiff. The job aided Powell in accomplishing the sexual assault on Plaintiff.

Taking the facts in the light most favorable to Plaintiff, the "mere opportunity" of working for Defendant did not give Powell his tremendous access to Plaintiff. It was the Nurse's Aide position that allowed Powell to enter the room in the first place to assist in restraining Plaintiff. It allowed Powell to remain in the room after Plaintiff was restrained. It allowed Powell to reenter the room through the adjoining bathroom door. It allowed Powell to trick Plaintiff into her fellatio-for-release belief. Furthermore, the particular aspects of Powell's Nurse's Aide position – as one of two Nurse's Aides in the ER of Defendant – allowed Powell access to molest the second woman, Ms. Shuman.

At page 11 of the Court of Appeals May 4, 2004 Opinion, (Appendix, pg. 14a) that Court opined that: "The employer supplied Powell neither specific access to, authority over, nor instrumentality for commission of the tort". But the Bueche deposition raised a fact question as to whether indeed Defendant/employer "supplied" Powell with specific access to Plaintiff.

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Furthermore, although Plaintiff need not go this far to create a submissable jury question, the employment relationship provided Powell with the "instrumentality for commission of the tort". Powell's omnibus, completely unrestricted access to the ER gave Powell the instrumentality and knowledge to reenter the room through the bathroom door.

The Court of Appeals Opinion cited with approval the Federal Court case of Costos v Coconut Island Co., 137 F.3d 46 (1st Cir. 1998). (See Court of Appeals Opinion, Appendix, pg. 12a).

In Costos, one Charles Bonney – an employee of the defendant – raped the plaintiff, one Patricia Costos, in her hotel room. Ms. Costos was asleep when she awoke to find Bonney having intercourse with her.

Plaintiff Costos sued the corporation that owned the hotel where the rape occurred. She contended that the defendant corporation was vicariously liable for Mr. Bonney's tort. The jury found in favor of the plaintiff, and the verdict was upheld by the United States Court of Appeals for the First Circuit.

In Costos, the plaintiff's vicarious liability claim was based on §219(2)(d) of the Restatement 2d of Agency. Costos pointed to the part of the Restatement that states that the master is liable for the tort of the servant if the servant "was aided in accomplishing the tort by the existence of the agency relationship". Costos, p. 48. Costos pointed out that, by virtue of his agency relationship, Bonney had access to the keys to Ms. Costos' room. Furthermore, he could otherwise observe Ms. Costos' movements. Thus, under §219(2)(d), the

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corporation that owned the hotel was liable for the tort committed by Mr. Bonney on Ms. Costos.

The Zsigo Court of Appeals Opinion held that, "Unlike Costos, the employment relationship provided Powell with the mere opportunity for tortious activity in the present case". (See Zsigo Court of Appeals Opinion, Appendix, pg. 13a). But the Court of Appeals erred as to this point.

Powell's job allowed Powell to enter the room of the mentally deranged Plaintiff as easily as if he had a key to the room. There is nothing in the Record indicating that **any** ER employee could have entered Plaintiff's room as Plaintiff thrashed about in the throes of a deranged episode. There is nothing in the Record indicating that **any** employee could have remained in Plaintiff's room after she was restrained. There is nothing in the Record reflecting that **any** employee would have the knowledge or access to reenter through this bathroom door, and then molest Plaintiff.

Furthermore, although this too goes beyond what is necessary to survive summary disposition, the omnibus authority given to Powell – at least the apparent authority – could well have led the mentally deranged Plaintiff to believe Powell had special power over her.

Powell's position afforded him the access and knowledge to select his mentally ill victim's room. His job allowed him to "isolate and find" his bound and restrained victims, and then sexually assault them as he did to Plaintiff and Ms. Schuman. Powell's "relationship with" Defendant provided Powell with "both the

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ways and means to enable him to commit" the molestations of Plaintiff and Schuman. (See May 4, 2004 Court of Appeals Opinion, Appendix, pg. 14a).

Nowhere in the Court of Appeals' May 4, 2004 Opinion is it even mentioned that Powell molested a second woman – Laura Schuman. But the molestation of Schuman supports the proposition that Powell's job gave him special access to restrained female patients and, thus, facilitated Powell in committing two (2) molestations of bound and restrained mentally ill women within a short period of time. The second molestation bolsters the argument that Powell's job provided him with the "ways and means" to molest restrained female patients – just as the Costos hotel manager's job provided the "ways and means" for the manager to enter the victim's room and rape her. See Costos v Coconut Island Co., 137 F.3d 46 (1st Cir. 1998).

The imposition of liability on Defendant in this case does not open the gates for a substantial new area of law. Not at all. As the Trial Court recognized, this is an **extremely** narrow, fact-specific case.

The fact that Powell was one (1) of two (2) Nurse's Aides working the Emergency Room the night of Plaintiff's molestation afforded Powell with exceptional "ways and means" to molest bound and restrained Emergency Room female patients. It was this "ways and means" that allowed Powell to molest the bound and restrained Plaintiff, and the bound and restrained Laura Schuman. It would be hard to conceive of a case with facts this compelling for the imposition of Restatement of Agency 2d §219(2)(d) liability. If this case does not fit within the

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confines Restatement Agency 2d §219(2)(d), then §219(2)(d) is essentially a dead letter.

The Court of Appeals correctly recognized the applicability of §219(2)(d). The Court of Appeals correctly cited to Costos. But the tragedy of the Court of Appeals Zsigo Opinion is its disregard of the Donna Bueche testimony and the Laura Schuman incident. As the Trial Court pointed out, the Bueche testimony alone raised a fact question as to whether Powell's position afforded him the "ways and means" to accomplish the molestation of Plaintiff.

It would be a travesty if the May 4, 2004 Court of Appeals Opinion remained in place. Judge White obviously recognized the injustice of the May 4, 2004 Opinion by voting to grant Plaintiff's Motion for Reconsideration.

There is but one (1) remaining avenue upon which Plaintiff can seek justice: the Michigan Supreme Court. Plaintiff ardently requests that the Michigan Supreme Court reverse the Court of Appeals in light of the fact that the Court of Appeals May 4, 2004 Opinion was clearly erroneous and will cause material injustice to Plaintiff.

II. ON APPEAL IN ZSIGO, THE MICHIGAN COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE RESTATEMENT OF AGENCY 2d §219(2)(d) APPLIES TO ACTIONS IN TORT IN MICHIGAN.

It is undisputed that, in its May 4, 2004 Opinion in this case, the Michigan Court of Appeals held that the Restatement of Agency 2d §219(2)(d) applies to actions in tort. (See Michigan Court of Appeals May 4, 2004 Opinion, Appendix, pg. 11a). The portion of the May 4, 2004 Court of Appeals Opinion with which Plaintiff disagrees is the Court of Appeals' conclusion that there was an absence

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of a fact question as to whether, under the facts presented at the Zsigo trial, Lorenzo Powell's agency relationship with Defendant aided Powell in accomplishing the torts committed by Powell on Plaintiff.

Defendant, however, appears to argue that Restatement of Agency 2d §219(2)(d) does not apply to torts in Michigan. Defendant cites the recent Michigan Court of Appeals Opinion of Salinas v Genesys Health System, 263 Mich App 315; 688 NW2d 112 (2004), in support of its position.

Salinas does not hold that the Restatement of Agency 2d §219(2)(d) does not apply in Michigan. Although Salinas did question the applicability of this Restatement provision, Salinas explicitly stated that, "We need not decide whether the Restatement exception has been or should be recognized." See Salinas v Genesys Health System, 263 Mich App 315; 688 NW2d 112 (2004).

In fact, Restatement of Agency 2d §219(2)(d) has a long history in Michigan law. As stated previously in this brief, the Michigan Supreme Court cited the Restatement of Agency 2d §219(2)(d) with favor in Champion v Nationwide Security, 450 Mich 702; 595 NW2d 596 (1996). In Champion, a supervisor for defendant raped a subordinate. The defendant argued that it could not be held liable for the rape because, even if the supervisor acted as defendant's agent while performing his other supervisory duties, he did not act as an agent during the rape. This Court specifically cited the Restatement of Agency 2d §219(2)(d) for the principle that the employer could be held liable under the circumstances even though the crime was not within the scope of the supervisor's

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employment. This Court further commented that the defendant's "construction of agency principles is far too narrow." Champion, 712.

In addition to the Champion decision, the Michigan Supreme Court and the Michigan Court of Appeals have commonly cited Restatement of Agency 2d §219(2)(d) with favor. See McCann v Michigan, 398 Mich 65, 72-73, 247 NW 2d 521 (1976) (plurality opinion of Justice Levin); McCalla v Ellis, 180 Mich App 372, 379, 446 NW 2d 904 (1989) ("Where it is the employer's delegation of authority that empowered the supervisor to act, the employer can be found liable."); Rushing v Wayne Co., 138 Mich App 121, 136-137, 358 NW 2d 904 (1984), vacated 436 Mich 247, 462 NW 2d 23 (1990); Borsuk v Wheeler, 133 Mich App 403, 411, 349 NW 2d 740 (1983) ("The principal is liable if the agent was aided in accomplishing the tort by the existence of the agency relationship."); Graves v Wayne Co., 124 Mich App 36, 41-42, 333 NW 2d 740 (1983); Gaston v Becker, 111 Mich App 692, 705-706, 314 NW 2d 728 (1981) (Holbrook, J. concurring); Elezovic v Ford Motor Co., 259 Mich App 187, 212, 673 NW 2d 776 (2003) (Kelly, J. concurring). The United States Supreme Court has also recognized the Restatement of Agency 2d §219(2)(d) as persuasive authority. See Burlington Industries, Inc. v Ellerth, 524 U.S. 742, 760, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998) (Proximity and regular contact may afford a captive pool of potential victims); Faragher v City of Boca Raton, 525 US 775, 802, 118 S. Ct. 2275 (1998).

As can be readily seen, Restatement of Agency 2d §219(2)(d) has a long and established history in Michigan and Federal jurisprudence. Plaintiff thus

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submits that the reasoning of the Zsigo Court of Appeals Panel, as set out at pages 3-8 of the attached Zsigo Opinion, (Appendix, pgs. 6a-11a) is sound: the Restatement of Agency 2d §219(2)(d) applies to actions in tort.

Where the Court of Appeals erred is in misreading the facts of this case. In this case, Nurse's Aid, Lorenzo Powell's job gave him unique and omnibus access to bound and helpless psychiatric patients. The fact that he raped patients on at least two occasions underscores this point.

Rarely, if ever, will this Court confront a fact pattern that fits more squarely into the plain language of The Restatement of Agency 2d §219(2)(d). If, as Defendant contends, there is no genuine issue of material fact that Lorenzo Powell was aided in accomplishing the tort by the existence of the agency relationship, then Plaintiff respectfully submits that the Restatement of Agency 2d §219(2)(d) applies to almost nothing. But, the truth is that Nurse Bueche's testimony established an issue of fact that Lorenzo Powell's job aided in the accomplishment of his tort, even under the narrowest construction of Restatement of Agency 2d §219(2)(d). Plaintiff therefore respectfully requests that this honorable court reverse the decision of the Court of Appeals and remand this matter for consideration of the other issues Defendant raised on appeal.

RELIEF REQUESTED

For the reasons stated above, Plaintiff/Appellant, Marian Zsigo, respectfully requests that the Michigan Supreme Court vacate the August 16, 2004 Order of the Michigan Court of Appeals denying Plaintiff's Motion for Reconsideration and, likewise, vacate the May 4, 2004 Opinion of the Michigan Court of Appeals. This

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case should then be remanded to the Michigan Court of Appeals so that the Court of Appeals can consider the other issues raised by Defendant's Appeal.

Dated: 7/5/05

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